CAROLYN HOECKER LUEDTKE (State Bar No. 207976)
Carolyn.Luedtke@mto.com
JUSTIN P. RAPHAEL (State Bar No. 292380)
Justin.Raphael@mto.com
CHRISTOPHER CRUZ (State Bar No. 346128)
Christopher.Cruz@mto.com
JAVIER KORDI (State Bar No. 348358)
Javier.Kordi@mto.com
MUNGER, TOLLES & OLSON LLP
560 Mission Street, Twenty-Seventh Floor
San Francisco, California 94105-2907
Telephone:(415) 512-4000
Facsimile:(415) 512-4077

Attorneys for Defendant National Collegiate Athletic Association

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JOSEPH COLON, SHANNON RAY, KHALA TAYLOR, PETER ROBINSON, KATHERINE SEBBANE, and PATRICK MEHLER, individually and on behalf of all those similarly situated,

Plaintiffs,

vs.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association,

Defendants.

Case No. 1:23-cv-00425-WBS-KJN

DEFENDANT NCAA'S NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Judge: Hon. William B. Shubb
Courtroom: 5
Date: July 24, 2023
Time: 1:30 p.m.

NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that, on July 24, 2023, at 1:30 p.m., or as soon thereafter as the matter may be heard, in Courtroom 5 of this Court, located at 501 I Street, Sacramento, California, Defendant National Collegiate Athletic Association ("NCAA") will, and hereby does, move this Court pursuant to Federal Rule of Civil Procedure 12 for an order dismissing Plaintiffs' Amended Complaint in the event that this Court denies the NCAA's concurrent motion to transfer this case to the United States District Court for the Southern District of Indiana pursuant to 28 U.S.C. § 1404(a) for the convenience of the parties and witnesses and in the interest of justice.

This Motion is based upon the following Memorandum of Points and Authorities, all other materials supporting this Motion, all pleadings on file, and any other matter submitted before or at the hearing on the Motion.

DATED: May 23, 2023 MUNGER, TOLLES & OLSON LLP

By: */s/Carolyn Hoecker Luedtke*
CAROLYN HOECKER LUEDTKE

Attorneys for Defendant National Collegiate Athletic Association

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Sports require teams to agree on rules. "The NCAA together with its members have long adopted and enforced rules that regulate college sports," which "concern everything from how the games are played to standards of amateurism to rules governing the size of athletic squads and coaching staffs." Am. Compl. ¶ 34. This case is about rules that colleges and universities in NCAA Division I adopted regarding how many paid coaches each of them can hire in dozens of sports other than football, basketball and baseball—from swimming and diving to softball to bowling.[1] Just as sports leagues of all kinds have rules about how many players and coaches each team can have, the NCAA Division I "bylaws authorize programs in each sport to hire a specific number of coaches," *id.* ¶ 44, and provide for a "limited number of paid coaches in each sport." *Id.* ¶ 2.

Sports "teams that need to cooperate are not trapped by antitrust law," *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 202 (2010), and no court has held that rules limiting the number of coaches or paid coaches on a team are an unlawful antitrust conspiracy. *See Hennessey v. NCAA*, 564 F.2d 1136, 1554 (5th Cir. 1977) (rejecting claim that cap on number of coaches per team violated antitrust laws). But that is what Plaintiffs allege here. Their theory is that the NCAA and the members of Division I engaged in "wage

[1] Plaintiffs here carved out the limit on the number of paid coaches on each Division I baseball team, which is being challenged in *Smart v. NCAA*, No. 2:22-cv-02125-WBS-KJN (E.D. Cal.). This Court related this case to *Smart*. *See* ECF 9.

fixing" when they "agreed to a bylaw that has restricted NCAA Division I schools to a limited number of paid coaches in each sport." Am. Compl. ¶¶ 1-2. Plaintiffs have patterned that theory on *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998), where a court found NCAA bylaws capping the salaries of certain paid coaches presumptively anticompetitive under a "quick look" standard and ultimately held that those bylaws violated the antitrust laws. Unlike the *Law* case, this case does not involve caps on the salaries of paid coaches. Rather, it involves bylaws regarding the number of coaches who can be paid. The NCAA's Division I members have authorized teams to have volunteer coaches to support student-athletes and have adopted bylaws that prohibit teams from circumventing the limits on paid coaches.

However, this motion does not call upon this Court to decide whether the *Law* case is persuasive or whether NCAA bylaws should be presumed anticompetitive after a "quick look." Regardless of which mode of antitrust scrutiny applies, Plaintiffs have failed to state an antitrust claim because they have failed to allege facts regarding how the alleged bylaws caused them injury, which is a required element of their antitrust claim. Plaintiffs volunteered to coach in various sports at various Division I colleges and universities at various times. In order to show that they lost money and were injured as a result of NCAA bylaws limiting the number of paid coaches, each Plaintiff must show that the Division I institution they volunteered for would have hired an additional paid coach in the sport they coach if the bylaws did not exist. Plaintiffs have not alleged those facts. The NCAA moved to dismiss the related *Smart* case on the same grounds.

Plaintiffs amended their Complaint after that motion was filed, but they still have not alleged the facts that the NCAA has argued are missing.

To the contrary, Plaintiffs' Amended Complaint alleges facts suggesting that many Division I institutions would not have hired additional paid coaches in many sports. Plaintiffs seek damages on behalf of coaches in dozens of different sports—by their own count, nearly 5,000 coaches in just one year. Plaintiffs' own allegations cast doubt on whether colleges and universities would hire additional paid coaches for all of those positions. Plaintiffs allege that "[t]here is a wide gulf among Division I schools," Am. Compl. ¶ 64, with respect to their allocation of resources, and that a "school's emphasis" on a particular sport will affect that school's willingness to pay coaches. *Id.* ¶ 38. No Plaintiff accounts for those facts with respect to whether the institutions they volunteered for would have hired additional paid coaches in the sport that Plaintiff coaches. Accordingly, Plaintiffs have failed to allege that the bylaws cause them antitrust injury.

Even if Plaintiffs have alleged causal antitrust injury, they have not pled a claim under the "rule of reason" because they have failed to allege that the NCAA has market power in a proper relevant market. The rule of reason requires Plaintiffs to define a market in order to show that they have market power. The relevant market depends on substitution to alternatives. If coaches have alternatives to coaching in NCAA Division I, then it would make no sense for Division I members to try to suppress the

coaches' compensation as Plaintiffs allege. Coaches would simply seek better pay elsewhere, defeating the purported scheme.

Plaintiffs have failed to allege a proper antitrust market for three reasons. *First*, Plaintiffs have failed to identify a specific relevant market at all. They closest they come is a passing reference to a "labor market for coaches," which is far too broad and vague. *Id.* ¶ 1. Plaintiffs do not allege that the NCAA has market power in a "labor market for coaches" generally. Nor could they.

Second, Plaintiffs' market allegations have improperly thrown together jobs coaching dozens of different sports. The law is clear that market definition depends on market participants' ability to substitute to alternatives, which stimulates competition to offer the most attractive choice. Plaintiffs' market allegations ignore that principle by grouping jobs coaching many different sports into the same market even though they are not substitutes. For example, Plaintiffs do not allege that coaching volleyball and track are substitutes, but they include both jobs in the same "labor market for coaches." Courts reject such markets on the pleadings. This Court should do the same.

Third, Plaintiffs have not accounted for "many opportunities for coaches to pursue their vocations in addition to those now partially limited with Division I members of the NCAA: colleges which are in other divisions of the NCAA; colleges which are not in the NCAA; professional teams; and high schools." *Hennessey*, 564 F.2d at 1154. Plaintiffs do not explain why jobs coaching high school or professional teams or individuals in the sports they coach are not substitutes that belong in the market.

Plaintiffs also have not pled cognizable allegations that jobs coaching in Division II or Division III are not substitutes for coaching in Division I. To the contrary, Plaintiffs allege that coaches have substituted from jobs coaching in Divisions II and III to jobs coaching Division I, which puts jobs in Divisions II and III in the same market.

This Court should transfer Plaintiffs' claims to the Southern District of Indiana. However, if the Court does not do so, it should dismiss Plaintiffs' antitrust claim.

II. RELEVANT BACKGROUND[2]

A. The NCAA and the Challenged Bylaws

The NCAA is a member association of more than 1,000 colleges and universities. Am. Compl. ¶ 13. More than 300 of those institutions are members of Division I. *Id.* ¶ 32. Plaintiffs allege that Division I institutions fielded teams in approximately 20 men's sports and 25 women's sports in 2020 and 2021. *Id.* The following chart summarizes Plaintiffs' allegations regarding the number of Division I teams in a select number of sports during the 2020-2021 season:

Men's Sport	Teams	Women's Sport	Teams
Cross Country	313	**Cross Country**	347
Golf	295	**Field Hockey**	77
Ice Hockey	61	**Golf**	263
Lacrosse	73	**Lacrosse**	118
Soccer	202	**Rowing**	83
Swimming and Diving	131	**Soccer**	335
Tennis	238	**Softball**	294
Indoor Track	265	**Swimming and Diving**	190

[2] This Motion recites the facts as alleged in Plaintiffs' Amended Complaint without conceding their truth.

Outdoor Track	288	**Tennis**	300
Wrestling	77	**Indoor Track**	329
		Outdoor Track	339
		Volleyball	333

Id. As Plaintiffs allege, *id.*, these 4,951 teams are just a subset of the thousands of teams that colleges and universities that members of Division I support each year.

Plaintiffs allege that "[t]he NCAA together with its members have long adopted and enforced rules that regulate college sports," which "concern everything from how the games are played to standards of amateurism to rules governing the size of athletic squads and coaching staffs." *Id.* ¶ 34. Indeed, like the members of many other associations of athletic competitors, the NCAA's member colleges and institutions that compete in Division I have adopted rules that provide for a "limited number of paid coaches in each sport." *Id.* ¶ 2 (citing NCAA Division I Bylaw 11.7.6). "The bylaws authorize programs in each sport to hire a specific number of coaches." *Id.* ¶ 44.[3]

The NCAA's Division I members have also agreed to enable colleges and universities to retain additional personnel to provide additional instruction and support to student-athletes. Thus, the Division I bylaws permit teams to have one "volunteer coach." *Id.* ¶¶ 3, 44. As the name suggests, Division I members

[3] *Cf.* NCAA Bylaw 11.7.6, available at https://web3.ncaa.org/lsdbi/bylaw?bylawId=40460. The challenged bylaws are appropriate for consideration on a motion to dismiss because Plaintiffs' Amended Complaint "refers extensively to the document" and because bylaws "form[] the basis of the [Plaintiffs'] claim." *Applied Underwriters, Inc. v. Lara*, 530 F. Supp. 3d 914, 923 (E.D. Cal. 2021) (Shubb, J.)(quoting *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003)).

cannot pay a volunteer coach. *Id.* ¶ 44. To ensure that a volunteer coach is not simply a paid coach that would violate the limit on the number of paid coaches, the Division I bylaws prohibit teams from offering volunteer coaches compensation beyond minimal, incidental non-cash benefits such as complementary tickets or meals in connection with their team's competitions. *Id.* ¶ 46.

In January 2023, the NCAA's Division I membership amended the Division I bylaws to permit an additional paid coach in Division I sports (other than football and basketball) and eliminate the volunteer coach position effective July 1, 2023. *Id.* ¶ 65. Plaintiffs' Amended Complaint does not allege that these new bylaws violate the antitrust laws.

Plaintiffs allege that they volunteered as coaches at various Division I institutions in various sports at various times. The following chart summarizes Plaintiffs' allegations:

Plaintiff	Institution	Sport	Years
Joseph Colon	Fresno State	Wrestling	2017-2020
Shannon Ray	Arizona State	Track and Field	2019-2021
Khala Taylor	San Jose State	Softball	2022-Present
Peter Robinson	University of Virginia	Swimming and Diving	2019-2021
Katherine Sebbane	University of Pittsburgh	Softball	2019-2021
Patrick Mehlert	American University	Men's Soccer	2019-2021

Id. ¶¶ 7-12. Plaintiffs do not allege that any Division I institution where any Plaintiff volunteered would have hired an additional paid coach in the sport that the Plaintiff coached or hired the Plaintiff as that paid coach.

III. LEGAL STANDARDS

To survive a motion to dismiss under Rule 12(b)(6), a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[L]abels and conclusions" or "a formulaic recitation of the elements of a cause of action" do not suffice. *Twombly*, 550 U.S. at 555. Thus, the court may disregard "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Dismissal is also warranted where a complaint "lacks a cognizable legal theory" or "'relief is barred' for some legal reason." *Friends of Roeding Park v. City of Fresno*, 848 F. Supp. 2d 1152, 1160 (E.D. Cal. 2012) (citations omitted).

IV. ARGUMENT

Plaintiffs have failed to allege a violation of Section 1 of the Sherman Act because they have not alleged that the NCAA's bylaws caused them any injury, which is a required element of their claim. In addition, Plaintiffs have failed to plead an antitrust claim under a "rule of reason" theory because they have not alleged a proper relevant antitrust market.

A. Plaintiffs Have Failed to Allege Causal Antitrust Injury

Plaintiffs have failed to allege a federal antitrust claim because they have not alleged "causal antitrust injury", which is "an essential element of any remedy under the Sherman Act." *Catlin v. Wash. Energy Co.*, 791 F.2d 1343, 1347 (9th Cir. 1986) (citation omitted). An antitrust plaintiff must "allege some

credible injury caused by the unlawful conduct." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1056 (9th Cir. 1999). Even if Plaintiffs were right that this is a price-fixing case (which they are not), they would still have to prove causal antitrust injury. *See Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990).

Claims of injury "where causation is highly speculative are not an appropriate basis for an antitrust claim." *Stearns v. Select Comfort Retail Corp.*, 2009 WL 1635931, at *13 (N.D. Cal. June 5, 2009); *see City of Oakland v. Oakland Raiders*, 20 F.4th 441, 459 (9th Cir. 2021) (affirming dismissal of antitrust claim where alleged theory of injury was "too speculative to establish antitrust standing"); *Reveal Chat Holdco, LLC v. Facebook, Inc.*, 471 F. Supp. 3d 981, 997-98 (N.D. Cal. 2020) (dismissing antitrust claim where "Plaintiffs have failed to plausibly allege in a non-conclusory manner that they themselves have been injured"). Pleading that "[t]he removal of some elements of price competition distorts the markets, and harms all the participants" does not suffice to allege causal antitrust injury. *Atl. Richfield Co.*, 495 U.S. at 339 n.8.

That is particularly true where, as here, an antitrust plaintiff's theory of injury is that the plaintiff would have bought or sold something that was not bought or sold in the actual world. For example, just as Plaintiffs here allege that NCAA bylaws provide for a "limited number of paid coaches in each sport." Am. Compl. ¶ 2, in *City of Oakland*, the City of Oakland alleged that the NFL's bylaws "limit[] both the number of teams and the freedom of teams to relocate." 20 F.4th at 450. The

Ninth Circuit affirmed dismissal because the City's complaint did not allege facts explaining why, "but for the limited number of teams, *Oakland* would still have an NFL team." *Id.* at 459 (emphasis added). The Court of Appeals explained that the complaint had not answered questions such as: "Would new teams have joined the NFL?" and "Would the City have been willing and able to pay a competitive price?" *Id.* at 459–60. Accordingly, there were "too many speculative links in the chain of causation between Defendants' alleged restrictions on output and the City's alleged injuries." *Id.* at 460.

The same is true here. Plaintiffs have challenged a "bylaw that has restricted NCAA Division I schools to a limited number of paid coaches in each sport." Am. Compl. ¶ 2. Thus, in order to show that they suffered an injury caused by the challenged bylaws, each Plaintiff must show that the Division I institution the Plaintiff volunteered for would have hired an *additional* paid coach in the sport the Plaintiff coached and would have hired the Plaintiff as that coach. For example, Plaintiff Joseph Colon alleges that he volunteered as a wrestling coach at Fresno State between 2017 and 2020. *Id.* ¶ 7. NCAA bylaws limit Division I institutions to three paid wrestling coaches. *Id.* ¶ 45.[4] Thus, in order for Plaintiff Colon to allege that he suffered an injury caused by that bylaw, he must show that Fresno State would have hired four paid wrestling coaches if the bylaws permitted it.

Plaintiffs have not alleged these facts. To the contrary,

[4] NCAA Bylaw 11.7.6, available at https://web3.ncaa.org/lsdbi/bylaw?bylawId=40460.

Plaintiffs' Amended Complaint alleges facts that cast doubt on whether the Division I institution each Plaintiff volunteered for would have hired an additional paid coach in the sport the Plaintiff coached. *See Somers v. Apple, Inc.*, 729 F. 3d 953, 964 (9th Cir. 2013) (dismissing antitrust claim where plaintiff alleged that Apple would have charged lower prices but did not account for "contradictory market facts alleged in her complaint"). Plaintiffs' own Amended Complaint alleges that "[t]here is a wide gulf among Division I schools," Am. Compl. ¶ 64, with respect to their allocation of resources. Plaintiffs further allege that a "school's emphasis" on a particular sport will affect that school's willingness to pay coaches. *Id.* ¶ 38. Those allegations undermine any inference that every Division I institution would have hired an additional paid coach for every single one of the 4,951 Division I teams identified in Plaintiffs' Amended Complaint, which Plaintiffs do not actually allege.

Plaintiffs cannot merely allege that in general volunteer coaches would have earned more if the NCAA bylaws permitted Division I institutions to hire more paid coaches. This case is "not yet a class action," so "[g]eneralized accusations of wrongdoing against [class] as a whole do not suffice." *Kelsey K. v. NFL Enters., LLC*, 254 F. Supp. 3d 1140, 1148 (N.D. Cal. 2017) (dismissing an antitrust claim alleging a conspiracy to suppress earnings of NFL cheerleaders). Rather, Plaintiffs must allege that the Division I institutions they volunteered for would have hired an additional paid coach *in the sports they coach*. Plaintiffs have not alleged this for any Plaintiff. That is fatal to Plaintiffs' antitrust claim regardless of whether that claim is

evaluated under a *per se*, "quick look" or "rule of reason" standard of scrutiny. *See* Am. Compl. ¶ 72.

B. Plaintiffs Have Failed to State an Antitrust Claim Under the Rule of Reason

Even if Plaintiffs had pled causal antitrust injury, their claim under the "rule of reason," *id.*, would still warrant dismissal because Plaintiffs have not pled a relevant antitrust market. *See Reilly v. Apple Inc.*, 578 F. Supp. 3d 1098, 1106 (N.D. Cal. 2022) ("Where a complaint fails to adequately allege a relevant market underlying its antitrust claims, those claims must be dismissed."); *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1123 (9th Cir. 2018) (affirming dismissal of antitrust claim where "proposed product markets are 'facially unsustainable' because they fail to include many 'reasonabl[y] interchangeab[le]' products") (citation omitted); *Newcal Indus., Inc. v. Ikon Off. Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008) (claim is subject to dismissal where it is "apparent from the face of the complaint that the alleged market suffers a fatal legal defect").

"[C]ourts usually cannot properly apply the rule of reason without an accurate definition of the relevant market" because "[w]ithout a definition of [the] market there is no way to measure [the defendant's] ability to lessen or destroy competition." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018) (citation omitted). Thus, under the rule of reason, a plausible market definition is "an essential predicate to the entire case." *Reilly*, 578 F. Supp. 3d at 1106 (dismissing antitrust claim for, among other things, failure to allege an adequate market); *see also Rock v. NCAA*, 928 F. Supp. 2d 1010, 1016, 1020-1023 (S.D. Ind. 2013) (granting motion

to dismiss antitrust claim challenging cap on number of scholarships on Division I football and basketball teams for failure to plead a proper relevant market); *see also Agnew v. NCAA*, 683 F.3d 328, 345-47 (7th Cir. 2012) (same).

"To survive a motion to dismiss, 'the market must encompass the product at issue as well as all economic substitutes for the product.'" *In re German Auto. Mfrs. Antitrust Litig.*, 497 F. Supp. 3d 745, 756 (N.D. Cal. 2020), *aff'd*, 2021 WL 4958987 (9th Cir. Oct. 26, 2021) (quoting *Newcal Indus.*, 513 F.3d at 1045). In economic terms, "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and the substitutes for it." *Id.* (citation omitted). Here, Plaintiffs allege that Division I institutions are a "buyer-side cartel." Am. Compl. ¶ 4. In such a case, the relevant market is "comprised of buyers who are seen by sellers as being reasonably good substitutes." *Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111, 1118 (10th Cir. 2008) (citation omitted). Thus, the market definition question here is whether Plaintiffs have alleged a market that includes jobs that coaches would consider substitutes.

Market definition focuses on substitutes because they constrain efforts to harm competition. *See Geneva Pharms. Tech. Corp. v. Barr Lab'ys Inc.*, 386 F.3d 485, 496 (2d Cir. 2004) ("The relevant market is defined as all products 'reasonably interchangeable by consumers for the same purposes,' because the ability of consumers to switch to a substitute restrains a firm's ability to raise prices above the competitive level."). If volunteer coaches can switch to other coaching opportunities, then

it would make little sense for Division I member institutions to exploit coaches as Plaintiffs allege because Plaintiffs could avoid the scheme and find employment coaching elsewhere.

Plaintiffs' Amended Complaint fails to allege a proper antitrust market for three reasons.

First, Plaintiffs' Amended Complaint never specifically identifies any relevant product market. The closest Plaintiffs come is to refer in passing to a "labor market for coaches." Am. Compl. ¶ 2; *see also id.* ¶ 4 ("the labor market for valuable college coaching services"). Such a vaguely defined market is insufficient as a matter of law because it would not enable one "to measure [the defendant's] ability to lessen or destroy competition." *Am. Express Co.*, 138 S. Ct. at 2285 (citation omitted). Indeed, Plaintiffs do not allege that the NCAA has market power in a "labor market for coaches" generally.

Courts reject antitrust claims premised on such inchoate markets. *E.g.*, *hiQ Labs, Inc. v. LinkedIn Corp.*, 485 F. Supp. 3d 1137, 1148 (N.D. Cal. 2020) (dismissing antitrust claim where "the parameters of the people analytics market – as pled – are vague" and it was not clear "what substitutes there are"); *Intel Corp. v. Fortress Inv. Grp. LLC*, 2020 WL 6390499, at *11 (N.D. Cal. July 15, 2020) (same where allegations regarding market were "vague and overbroad"); *Med Vets Inc. v. VIP Petcare Holdings, Inc.*, 2019 WL 1767335, at *4 (N.D. Cal. Apr. 22, 2019), *aff'd*, 811 F. App'x 422 (9th Cir. 2020)(same where alleged market was "veterinary wellness and medication products" because "one cannot determine what types of products are encompassed by the term 'wellness,' which plaintiffs do not define"); *Person v. Google, Inc.*), 2007 WL 832941, at *4

(N.D. Cal. Mar. 16, 2007) (same where "Plaintiff's definition of the relevant market is vague and overbroad"). This Court should do the same.

Second, to the extent that Plaintiffs have identified any relevant market, they have improperly included coaching positions in all sports, which are not substitutes. The law is clear that "the market must encompass the product at issue as well as all economic substitutes for the product." *Newcal Indus.*, 513 F.3d at 1045. Thus, the court in *Rock v. NCAA* concluded that a proposed nationwide market for the labor of student athletes is not legally cognizable" because "it includes all student-athletes in the same labor market without accounting for germane differences such as gender and sport played." *Rock*, 928 F. Supp. 2d at 1022.

The same is true here where Plaintiffs allege that they coached swimming and diving, softball, track and field, soccer and wrestling, but do not allege that coaching those sports are substitutes for each other. Plaintiffs do not allege, for example, that a job coaching wrestling is a substitute for a job coaching soccer, but Plaintiffs appear to include both jobs in the market. That is improper as a matter of law. *E.g.*, *Westlake Servs., LLC v. Credit Acceptance Corp.*, 2015 WL 9948723, at *5 (C.D. Cal. Dec. 7, 2015) (dismissing antitrust claim alleging markets that "include products that cannot plausibly be considered substitutes"); *Seirus Innovative Accessories, Inc. v. Cabela's, Inc.*, 2010 WL 6675046, at *3 (S.D. Cal. Apr. 20, 2010) (same as to antitrust claim alleging a "cold-weather face, neck and head protection market" that "could include wool hats, scarves, helmets, lotions, and a variety of other products that are not economic substitutes for the products at

issue" (citation omitted)); *Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc.*, 2010 WL 1541257, at *3 (N.D. Cal. Apr. 16, 2010), *aff'd,* 433 F. App'x 598 (9th Cir. 2011) (same as to antitrust claim alleging a market for "all pharmaceutical products" where plaintiffs did not allege that all such products "are reasonably interchangeable with one another" (citation omitted)).

Third, even considering each sport on its own (which Plaintiffs fail to do in their Amended Complaint), Plaintiffs have not accounted for substitutes for coaching in Division I. In upholding an NCAA bylaw capping the number of coaches on Division I football and basketball teams, the Fifth Circuit recognized that opportunities to coach outside of Division I can be competitively significant: "There are, indeed, many opportunities for coaches to pursue their vocations in addition to those now partially limited with Division I members of the NCAA: colleges which are in other divisions of the NCAA; colleges which are not in the NCAA; professional teams; and high schools." *Hennessey*, 564 F.2d at 1154. Plaintiffs' Amended Complaint does not plead facts supporting a plausible inference that a volunteer coach would not switch to one of these other coaching positions if compensation for coaches in Division I declined below the competitive level. Plaintiffs' "failure to address or analyze these plausible alternatives is fatal to [their] proposed market definition," *Reilly*, 578 F. Supp. 3d at 1108, and thus to their ability to show that the NCAA had market power to harm coaches.

Plaintiffs completely ignore opportunities to coach sports at high schools. Plaintiffs do not explain why, for example, working as head swimming or wrestling or field hockey or track coach at an

elite high school is not a substitute for working as an assistant coach for a college team.

Further, Plaintiffs offer no sound reason why coaching professional athletes in the sports Plaintiffs coach is not a substitute for coaching in Division I. Plaintiffs allege that "[p]rofessional coaching opportunities are non-existent or extremely limited for the NCAA Division I sports involved in this case," Am. Compl. ¶ 54, but they do not allege that there are more Division I coaching opportunities than professional opportunities in all sports. It is far from obvious, for example, that there are more opportunities coaching Division I golf than working as a golf pro (which further underscores the problem with defining a market that does not account for the particulars of coaching in each sport). *See Hicks*, 897 F.3d at 1122 (affirming dismissal of antitrust claim alleging market for advertising during live golf broadcasts where plaintiffs "provide no explanation why this group of fans is distinct for advertising purposes from the typical group of golf fans").

Plaintiffs allege that the NCAA has "espoused the view that college sports are 'a product that is distinct from professional sports.'" Am. Compl. ¶ 54. But what matters for market definition in this case is not whether college and professional sports are substitutes for viewers but whether jobs coaching college and professional sports are reasonable substitutes for coaches. *See Campfield*, 532 F.3d at 1118.

Although Plaintiffs have not formally defined any market limited to coaching in Division I, their Amended Complaint does allege facts that attempt to distinguish coaching in Division I

from coaching in Division II or III. To the extent that Plaintiffs' Amended Complaint could be read to try to allege a market limited to coaching in particular sports in Division I without saying so, Plaintiffs' Amended Complaint does not properly plead such a market. To the contrary, Plaintiffs allege that Division I teams have been "attracting new coaches from Division II and Division III to serve as volunteer coaches" in Division I. Am. Compl. ¶ 57. Allegations that coaches are substituting between jobs across NCAA Divisions support including jobs across all Divisions in the same market.

Plaintiffs allege that Division I coaching jobs provide coaches with the "highest quality" players, opponents, equipment, training methods and fellow coaches. *Id.* ¶ 56. However, Plaintiffs cannot define a market limited to jobs coaching in Division I by alleging that those jobs are better than coaching jobs in other Divisions. A "market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1163 (9th Cir. 2003) (citation omitted); *Datel Holdings Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974, 996 (N.D. Cal. 2010) ("Reasonable interchangeability means all products which could be used for the same general purpose, despite functional or price differences among them.").

Accordingly, "[c]ourts have repeatedly rejected efforts to define markets by price variances or product quality variances." *In re Super Premium Ice Cream Distrib. Antitrust Litig.*, 691 F. Supp. 1262, 1268 (N.D. Cal. 1988) ("Such distinctions are economically meaningless where the differences are actually a spectrum of price and quality differences."). For example, the

Supreme Court held that cellophane was in the same market as other flexible wrapping "despite cellophane's advantages" because "it has to meet competition from other materials in every one of its uses." *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 399 (1956). Even if other coaching "opportunities may not be as rewarding, either financially or emotionally, to many coaches, the fact of their existence must be taken into account in measuring the 'market power' of the NCAA Division I teams and the economic effects of the rule." *Hennessey*, 564 F.2d at 1154.

Plaintiffs' failure to allege a relevant antitrust market is fatal to their rule of reason claim. Unless and until Plaintiffs plead a proper relevant market, their federal antitrust claim cannot proceed unless they abandon their rule of reason theory and instead assume the burden to prove that the challenged bylaws limiting the number of paid coaches are "so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability." *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1113 n.6 (9th Cir. 2021).

V. CONCLUSION

In the event that the Court does not grant the NCAA's motion to transfer, the Court should dismiss Plaintiffs' claims.

Respectfully submitted,

DATED: May 23, 2023

MUNGER, TOLLES & OLSON LLP

By: */s/Carolyn Hoecker Luedtke*
CAROLYN HOECKER LUEDTKE

Attorneys for Defendant National Collegiate Athletic Association